87-77

Supreme Court, U.S.
FILED
JUN 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

DR. ROBERT HEATH,
Petitioner,

v.

DOUGLAS CAST, ROBERT HARDY, J. BROWN, and PETE PERRIN,
Respondents.

WILLIE MCKINLEY,
Petitioner,

v.

CITY OF RIVERSIDE, RICHARD CANALE, THOMAS BUCKINGHAM, KEITH MCCAULEY, RALPH MOORHOUSE, and WILLIAM EDENHOFER,
Respondents.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. In a civil rights action brought pursuant to 42 U.S.C. 1983 (1982), in which the affirmative defense of qualified immunity has been asserted, and in which the federal constitutional rights alleged to have been violated were clearly established at the time of the alleged violation, may the trial court instruct the jury on the affirmative defense of qualified immunity?[1]

2. May an appellate court treat as harmless error the clear violation of F. R. Civ. P. (West 1986) Rule 47(b), by selection of

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1. This issue is identical to both petitioners, and is the basis for this joint petition for certiorari. Sup. Ct. Rule 19.4. Issues 2-4 concern only petitioner Heath.

In light of this Court's June 25, 1987 decision in Anderson v. Creighton, 85-1520, it is clear that the answer to the question posed in issue No. 1 must be "no."

an alternate juror by lot to replace an excused regular juror, when such trial court clear error affects a substantial right to trial by jury, and/or when the harmless error rule, F. R. Civ. P. Rule 61, applies only to trial courts?[2]

3. Is the grant of a state court suppression motion based on a state court finding of unconstitutional conduct issue preclusive in a subsequent action brought under 42 U.S.C. 1983?

4. Is the admission in evidence in an action under 42 U.S.C. 1983 of prior arrests of the plaintiff by other members of the same police force permissible to show bias against different police officer defendants in the Section 1983 action?

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2. Issues 2-4 involve only Dr. Heath's petition.

TABLE OF CONTENTS

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CASES

PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1986

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DR. ROBERT HEATH, PETITIONER,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dr. Robert Heath and Willie McKinley petition this Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases.

## OPINIONS BELOW

The opinions of the Court of Appeals (App. A., and App. B. infra) are an opinion published at 814 F. 2d 254 (9th Cir.1987)(Heath), and a memorandum not for publication (McKinley), respectively.

## JURISDICTION

The judgments of the Court of Appeals were entered on March 24, 1987 and June 4, 1987, respectively. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1) and Rule 19.4 of this Court.

## STATEMENT

1. Heath.

In the complaint, CR-1, it is alleged that defendant Newport Beach, California police officers illegally seized plaintiff by using excessive force and arresting plaintiff, in violation of Amendment IV to the United States Constitution.

A. Good Faith Jury Instruction. In Heath, the affirmative defense of good faith/qualified immunity was pled in the answer, but no "extraordinary circumstances," Harlow v. Fitzgerald, 457 U.S. 800 (1982), were pled. Heath timely objected to a jury instruction on good faith/qualified immunity, CR-35, p. 2, ll. 2-5, the issue was briefed, CR-56, and the court decided that no good faith instruction would be given to the jury. This was done in chambers and not on the record. Notwithstanding this ruling, the court gave a good faith instruction, RT-10-721, Heath again objected, RT-10-87, the court indicated it would "review it and see if I think a change needs to be made...[and] if so, I will give it at the end of argument." Ibid. The court made no change at the end of argument. The Ninth Circuit held on this point that "[t]he qualified immunity defense is available in cases of unlawful arrest [,]' Hamblen v. County of

Los Angeles, 803 F. 2d 462, 265 (9th Cir. 1986) (citations omitted) [a]nd in any event only one jury instruction included the words 'good faith', and that instruction concerned the issue of punitive damages not qualified immunity." 814 F. 2d at 261. The subject instruction is set out at footnote 6 to the Ninth Circuit opinion. The instruction is not a punitive damages instruction, but is the defendants' contention instruction in which defendants clearly set forth their good faith defense.

B. Selection of Alternate Juror by Lot. Ms. Basilio was called first as an alternate juror. Ms. Schimidtt was called second as an alternate juror. Ms. Basilio was excused. Ms. Bolles was called third as an alternate juror. RT-1-45-50. A regular juror was excused after the trial began, and the trial court, over plaintiff's strong objection, insisted on selecting by lot an alternate to replace the regular juror. Ms. Bolles, the third

alternate called, was chosen by lot to join the jury. RT-7-26-29. The Ninth Circuit ruled that (1) plaintiff treated the third alternate called, Bolles, as the de facto first alternate, and (2) the erroneous procedure was harmless error. The first ruling by the Ninth Circuit is not supported even by its own citation to the record: plaintiff's counsel clearly and unambiguously told the trial court that "I think the Federal Rules of Civil Procedure say they have to be taken in the order in which they were chosen." 814 F. 2d at 256. The trial court arrogantly responded: "All right. We are going to do it my way [by lot]." Ibid. The second Ninth Circuit ruling, on harmless error, is not supported or supportable.

C. Issue Preclusion. In ruling that the trial court correctly denied plaintiff's motion for summary adjudication of the issue of a constitutional violation, based on the grant by

a state court of plaintiff's suppression motion, the Ninth Circuit misapplied California law on issue preclusion by finding that, in California, an issue decided in a prior criminal proceeding is not issue preclusive in a subsequent civil action. California issue preclusion law, as relied on by the Ninth Circuit, denies issue preclusion on suppression motions only in subsequent criminal actions, but not in subsequent civil actions.

D. Prior Bad Acts. The trial court admitted evidence of prior arrests of plaintiff by other Newport Beach police officers, and the Ninth Circuit upheld this ruling on the theory that the evidence was "probative of... bias against the Newport Beach police and of Heath's motive in bringing this action." 814 F. 2d at 259.

2. McKinley.

In the complaint, CR-1, it is alleged that defendant Riverside, California police officers

illegally seized plaintiff, a black American, by using excessive force and arresting plaintiff at an after-hours Riverside, California bar attended only by black persons, while rousting persons at the bar, in violation of Amendments IV and XIV to the United States Constitution.

The affirmative defense of qualified immunity was pled in the answer, but no extraordinary circumstances were pled. App. at p. B-3. Over objection, the trial court instructed on the defense. The Ninth Circuit held that "the defense is available...even though applicable constitutional standards were 'sufficiently well-established.' Bilbrey by Bilbrey v. Brown, 738 F. 2d 1462 at 1466-1467 99th Cir. 1984)...[and b]oth subjective and objective elements are injected into the elements of the qualified immunity defense." Id. at p. B-3.

REASONS FOR GRANTING THE PETITION

1. There has been a faulty construction of decisions of this Court which will affect virtually every action brought under 42 U.S.C. 1983 and pursuant to this Court's opinion in Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

2. Public officials have used methods which are alien to our American system of justice.

3. The opinions below are at odds with

A. decisions in the same Circuit, and

B. decisions in other circuits.

Petitioners arecognizant of the fact that the Supreme Court does not sit as a court of errors, but rather sits to resolve important issues of federal law.

The fundamental civil rights laws which govern the conduct of all law enforcement officers throughout this Country and which

provide for remedies for those who allege and prove that their federal civil rights were violated, have been interpreted in such a way so as to pervert their meaning, invite illegal and unethical conduct, and impugn the integrity of the federal courts.

Specifically, 42 U.S.C. 1983 has been interpreted to provide a defense to allegations of wrongdoing by police officers with which this Court has done away, and with respect to which other decisions both in the same Circuit and in other Circuits are at odds.

I. QUALIFIED IMMUNITY.

1. THIS COURT DID AWAY WITH THE SUBJECTIVE COMPONENT OF THE DEFENSE OF QUALIFIED IMMUNITY.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court did away with the subjective component of the affirmative defense of qualified immunity. In Mitchell v. Forsythe, 105 S. Ct. 2806, 2816 (1985), this Court held:

> All [a court] need determine [on a motion to adjudicate the issue of qualified immunity] is a question of law: · whether the legal norms allegedly violate by the defendant were clearly established at the time of the challenged actions...

The effect of both Harlow and Mitchell was to reduce the question of the applicability of the affirmative defense of qualified immunity to a purely legal question. In so doing, this Court, sub silentio, modified its holding in Procunier v. Navarette, 434 U.S. 555, 562 (1978), to the extent Procunier provided that part of the test on determining the applicability of the qualified immunity defense was "if [defendants] knew or should have known of [the] right [violated], and if [defendants] should have known that their conduct violated the constitutional norm." The "knew or should have known" part of the Procunier test was part

of the subjective component of the defense, and was done away with in Harlow.

The issue of qualified immunity is one purely of law: if the law was clear, the defense is inapplicable; if the law was not clear, not only is the defense applicable, but the action is over for the plaintiff, for the defense operates as a bar to suit.

The Seventh Circuit followed this Court's holding on this point in Bates v. Jean, 745 F. 2d 1146, 1151 (7th Cir. 1984) ("[T]he question of qualified immunity is addressed to the court not the jury. See Mitchell v. Forsythe, ___ U.S. ___, 105 C. Ct. 2806 (1985); Harlow, 457 U.S [800] at 818-19....") (Emphasis supplied), and in Benson v. Allphin, 786 F. 2d 268, 274 (7th Cir. 1986) ("[A]n inquiry into [officer] Allphin's actual state of mind is not appropriate under Harlow; the only question is whether his actions were objectively reasonable [and that is an issue for the trial court to decide].")

Also, the Ninth Circuit completely disregards the "clearly established legal norms" test, Mitchell supra, which operates when the law is found to be clearly established, to preclude the defense absent Harlow's "extraordinary circumstances" condition subsequent having been pleaded and proved. In Lutz v. Weld, 784 F. 2d 340 (10th Cir. 1986), the Tenth Circuit correctly followed the law and held that when relevant law is clearly established

> [d]efendants [are] entitled to an instruction on their qualified immunity defense only by raising a fact issue as to whether there were exceptional circumstances such that a reasonable person..would not have known the relevant legal standard [Citation to Harlow omitted.]

No such "extraordinary circumstances" were alleged by the defendants in this case, and

there was therefore no fact issue concerning the defense to be submitted to the jury. See Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 3018, 82 L. Ed. 2d 139 (1984) ("no other 'circumstances' are relevant to the issue of qualified immunity").

Both the trial court and the Court of Appeals failed to follow this Court's holdings in both Harlow and Mitchell. See also, Davis vs. Scherer, 104 S. Ct. 3012, 3018 (1984).

Therefore, on this ground, certiorari should be granted.

2. THE CONSTRUCTION GIVEN BY THE COURTS BELOW TO THE DEFENSE WILL OPERATE TO PERMIT PUBLIC OFFICIALS TO ESCAPE LIABILITY FOR WRONGFUL CONDUCT BASED ON A THEORY OF DEFENSE WHICH NO LONGER EXISTS.

In the complaints it is alleged that defendant police used methods alien to our Constitution. To permit these officials to

escape potential liability based on a defense which this Court has ruled no longer exists, in the form in which it existed prior to this Court's decisions in Harlow, Mitchell and Scherer, is a result which will have a significant deleterious effect on constitutional litigation at least throughout the vast environs of the Ninth Circuit so that this Court should grant certiorari.

3. THE OPINIONS BELOW ARE AT ODDS BOTH WITH DECISIONS IN THE NINTH CIRCUIT AND OTHER CIRCUITS.

A. The opinions below are at odds with other Ninth Circuit decisions. See, Lowe v. City of Monrovia, 775 F. 2d 998, 1011 (9th Cir. 1985); Flores v. Pierce, 617 F. 2d 1386, 1391-92 (9th Cir.), cert. denied, 449 U.S. 875 (1980); Haygood v. Younger, 717 F. 2d 1472, 1483 (9th Cir. 1983), withdrawn, 729 F. 2d 613 (9th Cir. 1984), reversed on other grounds, 769

F. 2d 1350 (9th Cir. 1985); but see, Bilbrey v. Brown, 738 F. 2d 1462 (9th Cir. 1984).

B. The opinions below are at odds with the decisions in all other Circuits who have ruled on this issue. See, B.C.R. v. Fontaine, 727 F. 2d 7, 10 (1st Cir. 1984); Trejo v. Perez, 693 F. 2d 482, 485 (5th Cir.1982); Stokes v. Delcambre, 710 F. 2d 1120, 1125 (5th Cir. 1983); Donta v. Hooper, 774 F. 2d 716, 719 (6th Cir. 1985) pet. for cert. filed March 15, 1986; Windsor v. Tennessean, 719 F. 2d 155, 165 (6th Cir. 1983); cert. denied, 105 S. Ct. 105 (1984); Bates v. Jean, 745 F. 2d 1146, 1151 (7th Cir. 1984); Benson v. Allphin, 786 F. 2d 268, 274 (7th Cir. 1986); Patzner v. Burkett, 779 F. 2d 1363, 1371 (8th Cir. 1985); Goodwin v. Circuit Court, 729 F. 2d 541 (8th Cir. 1984); Lutz v. Weld, 784 F. 2d 340 (10th Cir. 1986). Cf. Skevofilax v. Quigley, 585 F. Supp. 582 (D.N.J. 1984) (an excellent discussion of what a trial court must

do in order to implement this Court's instructions on application of the Harlow qualified immunity test).

What the trial court did, and what the appeals court affirmed, constitutes an application of the qualified immunity defense in civil rights actions which was eschewed by this Court in 1982. In effect, the court below has held that there still is a subjective component of the defense. Since competent public officials are presumed to know clearly established law and what conduct is prescribed by clearly established law, Harlow, supra, once a trial court has determined, as it must under Harlow, that the applicable law was clearly established at the relevant time, it is impermissible for that Court then to instruct the jury on the defense of qualified immunity and ask it to determine whether the officer, as the Court of Appeals below held, "should have known of that right['s existence] and ... if

they knew or should have known that their conduct violated the constitutional norm." That is a formulation of the subjective component of the defense this Court did away with in Harlow.

It is important that this Court make perfectly clear its holding in Harlow so that its prescription will be applied with uniformity throughout the various Circuits in the federal system and within the environs of the vast Ninth Circuit.

II. SELECTION OF ALTERNATE JUROR

1. RULE 47(B), F. R. CIV. P., CLEARLY WAS VIOLATED, AND ITS VIOLATION IS NOT HARMLESS ERROR.

Rule 47 (b), F. R. Civ. P. (West 1986), clearly requires that "[a]lternate jurors in the order in which they are called shall replace jurors who...become or are found to be...disqualified..." The Heath court found a clear violation of this Rule. The violation

was in arrogant defiance of the Rule - "We are going to do it my way [notwithstanding that the court was advised of the correct way]." RT-7-26-29.

Contrary to the Ninth Circuit's unsupported finding, plaintiff's counsel never treated the alternate called third as the de facto first alternate. Clearly, plaintiff's counsel advised the trial court that "they [alternates] have to be taken in the order in which they were chosen." Ibid. (The Ninth Circuit's suggestion that the seat in which an alternate sits is dispositive on who was called first is absurd, as is its implied suggestion that plaintiff's counsel should have initiated a game of musical chairs by the trial court.)

The right to a trial by jury, especially in a civil rights action, is a hallmark of our American system of justice. The abrogation of any facet of that right by an arrogant trial judge whose son is a police officer for the

City of Southgate, a suburb of Los Angeles, and who leaned backwards to help the police defendants in this case by doing it "my way," cannot be countenanced as harmless error; for the harm to the brain-damaged Dr. Heath, who previously was a successful dentist with a Wechsler intelligence quotient of 140, and who now has an I.Q. of 90, is not harmless, but catastrophic.

To hold this error harmless is to countenance and to invite violation of the provisions of Rule 47(b). How can compliance with its provisions be had, when is violation is ruled harmless error? Are judges to abrogate its provisions on whim?

Litigants have a constitutional right to have trials completed by a particular jury. U.S.A. v. Jorn, 400 U.S. 470, 484 (1971). The Ninth Circuit, in this case, ignored its en banc holding in U.S.A. v. Lamb, 529 F. 2d 1153, 1155 (9th Cir. 1975) (en banc), that

"[r]eversal is required because of the failure of the District Court to comply with the plain requirements of Fed. R. Crim. P. 24(c)." The words of Rule 24(c) are the same as the words of Rule 47(b). "The [language of Rule 24(c)] is unambiguous [and]...[t]he Rule is phrased in mandatory terms...." Id. at 1156. So too is the language of Rule 47(b) unambiguous, and so too is its phrasing mandatory. In Keykendall v. Southern Ry. Co., 652 F. 2d 391 (4th Cir. 1981), the court held that the mandatory language of Rule 47(b) must be followed.

Just one week ago, in Gray v. Mississippi, 85-5454 (U.S. Sup. Ct. May 18, 1987), this Court held:

> [T]he impartiality of the ajudicator goes to the very integrity of the legal system....
>
> We have recognized that some constitutional rights [are] so basic to a fair trial that their infraction

can never be treated as harmless error. [Citation omitted.] The right to an impartial adjudicator, be it judge or jury, is such a right.

...

[This] case brings into focus one of the real-world factors that render inappropriate the application of the harmless-error analysis to [jury selection].

...

[T]he relevant inquiry [on the issue of jury selection, so far as application of the harmless error rule is concerned] is "whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error"....[Citations omitted.]

Due to the nature of trial counsel's on-the-spot decisionmaking during

> jury selection, the number of peremptory challenges remaining for counsel's use clearly affects his exercise of those challenges... The nature of the jury selection process defies any attempt to establish that an erroneous...exclusion of a juror is harmless.

Here, too, real-world factors render inappropriate application of the harmless error rule. The relevant inquiry should be whether the jury selection process and/or the composition of the panel, after the alternate replaced the regular juror, "could possibly have been affected by the trial court's error." Application of the provisions of Rule 47(b) should be both uniform and predictable, and not ad hoc as the Ninth Circuit has ruled in this case. Clearly, the trial court had some reason to tamper intentionally, and in the face of the unambigious and mandatory language of Rule

47(b), with the alternate process, and only non-application of the harmless error rule can prevent such abuse.

Contrary to the Ninth Circuit holding, citing the precatory words and dictum of McDonough v. Greenwood, 464 U.S. 548, 553-54 (1984), to be legally binding precedent, no case stands for the proposition that Rule 61, F. R. Civ. P. (West 1986), the harmless error rule, applies to appellate courts: by its plain language, Rule 61 applies only to trial courts on motions for new trials, or to vacate, disturb or set aside a verdict. The scope of Rule 61 does not permit of expansion absent legislation. Because, under Rule 61, errors which "affect the substantial rights of the parties" bar application of the harmless error rule, in no event should it be applied here because the jury selection process embodies a substantial right.

III. ISSUE PRECLUSION

The holding of the Ninth Circuit that, under California law, the finding of a constitutional violation in a prior state court suppression hearing may not be issue preclusive in a subsequent civil rights action is contrary to California law, and to the notions of justice and judicial economy.

California law as set forth in People v. Gephart, 93 Cal. App. 3d 999-1000 (9170), and on which the Ninth Circuit bases its holding on this issue, provides only that a ruling in a prior criminal action on a suppression motion is not issue preclusive in a subsequent criminal action. Gephart sets forth the rationale for this limited rule to be the public policy of not hobbling prosecutors in subsequent criminal actions. That rationale, or public policy, is inapplicable here. Indeed, California law on this point is contrary to the Ninth Circuit holding. In

Miller v. Superior Court, 168 Cal. App. 3d 376 (1985), it was held that a criminal action suppression hearing's results were issue preclusive in a subsequent civil action.

This Court should set forth a uniform rule on this important issue that comes up in more than half of the civil rights cases in the federal courts. See Wilson v. Garcia, 105 S. Ct. 1938 (1985).

IV. PRIOR BAD ACTS

There is no basis in fact or in law to permit the introduction in evidence of prior arrests by the same police department. It cannot be gainsaid that such evidence serves only to smear plaintiff, and arrest by an officer in a police department does not go to the issue of prejudice against another officer. It is clear that a jury knows of the inherent prejudice just by virtue of the suit before it. Rules 401-404, 607-08, and 609(a) make inadmissible such evidence. Its prejudicial

effect is overwhelming and insurmountable in a civil rights action, and this Court should establish a per se rule that such evidence is inadmissible. See Cohn v. Papke, 655 F. 2d 191, 193-94 (9th Cir. 1981) (only purpose of such evidence is to besmirch character, and its is inadmissible); Hirst v. Gertzen, 676 F. 3d 1252, 1262 (9th Cir. 1982) (same); U.S.A. v. Ortega, 561 F. 2d 803, 805-06 (9th Cir. 1977) (same).

## CONCLUSION

This petition should be granted.

STEPHEN YAGMAN and MARION R. YAGMAN,
YAGMAN & YAGMAN, P.C.

Attorneys for Petitioners

# APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| DR. ROBERT HEATH,<br><br>Plaintiff-Appellant,<br><br>vs.<br><br>DOUGLAS CAST; ROBERT HARDY; J. BROWN; OFFICER NO. 482 PERRIN,<br><br>Defendants-Appellees. | ) | No. 85-6571<br><br>CV-84-1397-WDK<br><br>OPINION<br><br>FILED MARCH 24, 1987 |

Appeal from the United States District Court for the Central District of California.

BEFORE: ALARCON, REINHARDT and THOMPSON, Circuit Judges

DAVID R. THOMPSON, Circuit Judge:

Appellant Robert Heath brought this civil rights action under 42 U.S.C. § 1983. He claimed that Newport Beach police officers arrested him without probable cause and used excessive force to effect his arrest. Following a jury trial in the district court,

judgment was entered in favor of the police officers. On appeal, Heath contends the trial court erred (1) in seating an alternate juror by lot, (2) by failing to give preclusive effect to a prior state court ruling which suppressed evidence, (3) in admitting evidence of prior bad acts, (4) in refusing to admit evidence of the dismissal of state criminal charges pertaining to his arrest, (5) in failing to give requested jury instructions, (6) in giving jury instructions he contends were improper, (7) in not permitting him to recall a medical expert witness who had testified, and (8) in refusing to exclude testimony by another medical expert. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

I

FACTS

Heath and his brother, Larry Heath ("Larry"), were in a bar in Newport Beach, California. A police officer asked Larry for identification. When Larry failed to produce the identification, he was taken out of the bar by the officer. Heath protested the detention of his brother, Larry. An altercation with the police ensued and Heath was arrested. He was charged with interference with a police officer in the discharge of his duties (Cal. Penal Code § 148) and battery upon an officer (Cal. Penal Code § 243). In the subsequent criminal prosecution in state court, Heath moved to suppress any testimony by the police officers concerning the circumstances of his arrest from the time the officers first approached Larry in the bar. His motion was made under California Penal Code section 1538.5. The motion was

granted on the ground that in arresting Heath the police officers had acted without probable cause and had violated Heath's fourth amendment rights. After his suppression motion was granted, Heath moved to dismiss all of the state charges. The motion was unopposed by the prosecution. The state court granted the motion and the charges were dismissed. Heath then filed this civil rights action.

II

ANALYSIS

A. Seating Alternate Juror by Lot

After the regular jury was impaneled, two alternate jurors were selected. The trail transcript reflects the following with regard to this selection process:

> THE COURT: Now we need to get two alternate jurors. I'm going to suggest that the first name called take the first seat in the second row nearest to this end

of the jurybox, and the second alternate take the seat right next to the first one....

THE CLERK: Jesusa Basilio. B-a-s-i-l-i-o. First name spelled J-e-s-u-s-a. Again the last name is spelled B-a-s-i-l-i-o-.

THE COURT: Miss Basilio, if you are chosen, you will act as alternate juror. Let's get the second alternate first and then we will start the questioning.

THE CLERK: Sharon Schmitt. S-c-h-m-i-t-t. Sharon Schmitt...

(emphasis added)

The two alternate jurors, Ms. Basilio and Ms. Schmitt, were seated, respectively, where the first and second alternate jurors would sit during trial. Basilio, who had been called first, was excused for cause. Ms. Bolles was then called, seated in the first alternate

juror seat vacated by Basilio and questioned as the prospective first alternate. Only after the completion of Bolles' questioning was Schmitt questioned. Following the court's voir dire of the two alternates, the trial judge asked if either party wished to exercise a peremptory challenge. Neither party did, and Bolles and Schmitt were sworn in as the alternate jurors. Bolles remained in the first alternate seat and Schmitt in the second; they occupied these positions throughout the trial.

During the trial one of the regular jurors was excused because of illness. The trial judge proposed selecting one of the alternates to replace the excused juror by placing the nametags of Bolles and Schmitt in a metal box and drawing one out randomly. The following colloquy then occurred:

MR. YAGMAN: I believe the appropriate procedure is that Alternate Number One is be taken first, that there is not to be a drawing.

THE COURT: No, there is no Number One or Two. Alternate.

MR. YAGMAN: They were designated as One and Two, Your Honor. And the rules provide that that happens absent a stipulation. And there has been no signed stipulation.

THE COURT: I've never worked it that way. Alternates are alternates, and we draw.

MR. YAGMAN: I think the Federal Rules of Civil Procedure say they have to be taken in the order in which they were chosen.

THE COURT: All right. We are going to do it my way. Do you have any objection?

MR. FEELEY (defense counsel): No, Your Honor.

THE COURT: All right. (emphasis added).

In contending that the first alternate should be the replacement juror, Heath's counsel (Mr. Yagman) did not state whether he considered Bolles or Schmitt to be that individual. Over his objection, the court proceeded to draw by lot, and the nametag of Bolles was drawn. Bolles was then seated as a regular juror and the trial continued. Heath argues, as he did in his motion for a new trial, that the procedure followed by the district court in seating Bolles violated Federal Rule of Civil Procedure 47(b), that Schmitt should have replaced the ill juror, and that a new trial is required.

Violation of Rule 47(b)

Rule 47(b) provides in relevant part: "Alternate jurors in the order in which they

are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become ... unable ... to perform their duties." Fed. R. Civ. P. 47(b) (emphasis added). We review the district court's interpretation of this rule de novo, United States v. McConney, 728 F. 2d 1195, 1201 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984). We conclude that the trial court erred in selecting the replacement juror by lot rather than by following the procedure prescribed by Rule 47(b). Schmitt was called ahead of Bolles and she should have been seated as a regular juror ahead of Bolles. The violation of the rule is clear. Use of the lottery system to select jurors is not permitted. See Fed. R. Civ. P. 47(b). The more difficult question is whether reversal is required.

Heath argues that the violation of Rule 47(b) was prejudicial. He points out that the Rule entitles each side to only one peremptory challenge when two alternate jurors are to be impaneled. He argues, with some force, that because the first alternate is more likely than the second to end up serving as a regular juror, counsel are more concerned about the first alternate and more likely to exercise their peremptory challenge to excuse a person being considered for that position. Accordingly, Heath says, to exercise Rule 47 rights effectively, a party must know which of two alternate jurors will be the first to replace a regular juror. He says that counsel might use different standards in determining whether to challenge a prospective juror depending on whether that juror is to be the first or second alternate.

In the circumstances of the case before us, the use of a lottery to select one of the two alternates as a replacement juror, while clearly erroneous, was also clearly harmless beyond a reasonable doubt. While a lottery should not have been used in the absence of a stipulatoin by both parties, its use here resulted in the selection of Bolles as the replacement juror. Bolles, as we have stated, was questioned first during voir dire and was seated, from the moment she stepped forward, in the chair designated for the first alternate. Moreover, in the initial process by which the alternates were selected, the court referred to Schmitt's status as that of "second alternate." And at the time of the lottery, Heath reminded the court of the earlier designation of the jurors as alternate one and alternate two. In sum, Bolles was treated by the court and by Heath as the de facto first alternate and

Schmitt was treated as the de facto second alternate during the entire trial up to the time of the lottery. Because it was Bolles who ultimately replaced the excused juror, the use of the lottery did not affect Heath's earlier decision not to exercise a peremptory challenge as to either Bolles or Schmitt. It is clear to us, therefore, that the error in seating Bolles as a regular juror did not affect the substantial rights of any party. Fed. R. Civ. P. 61. [1]

"While in a narrow sense Rule 61 applies only to the district courts, see Fed. R. Civ. Proc. 1, it is well settled that the appellate courts should act in accordance with the salutory policy embodied in Rule 61."

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1. Rule 61 provides:
No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or anything done or omitted by the court or by any of the parties is ground for granting a new

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554, 104 S.Ct. 845, 849, 78 L.Ed.2d 663 (1984). And as the Supreme Court stated in McDonough Power:

> "'[A litigant] is entitled to a fair trial but not a perfect one', for there are no perfect trials." (citations omitted). Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for

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1. contd.

> trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgement or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. Fed. R. Civ. P. 61 (emphasis added).

society which pays the judges and support personnel who manage the trials. It seems doubtful that our judicial system would have resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing case load....

> We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered "'citadels of technicality.'" (citations omitted). The harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for "error" and ignore errors that do not affect the essential fairness of the trial....

Id. at 553, 104 S. Ct. at 848.

We conclude that in this case the district court did not commit reversible error, notwithstanding the violation of Rule 47(b). In so doing, we do not condone violations of the Rule and note that under different circumstances its violation might require a new trial.

B. Issue Preclusion

The gravamen of Heath's lawsuit is his contention that he was arrested without probable cause and that the police officers used excessive force to effect his arrest. He argues the grant of his motion to suppress evidence under California Penal Code section 1538.5 in his state criminal case precludes the litigation of the issues of probable cause and excessive force in this case. He bases this argument on the doctrine of collateral estoppel.

The availability of collateral estoppel is a mixed question of law and fact in which legal issues predominate. We review these issues de novo. Davis & Cox v. Summar Corp., 751 F.2d 1507, 1519 (9th Cir.1985). See United States v. McConney, 728 F. 2d 1195, 1202-04 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984). State law governs the doctrine of issue preclusion in federal courts. Takahashi v. Board of Trustees, 783 F. 2d 848, 850 (9th Cir.), cert. denied, ___ U.S. ___, 106 S. Ct. 2916, 91 L. Ed. 2d 545 (1986) (doctrine of collateral estoppel applies to section 1983 cases).

California courts apply a three-step analysis to determine whether collateral estoppel is applicable to a particular issue. First, there must be a final judgment on the merits. Second, the issue decided in the prior adjudication must be identical to the one

presented in the action in question. Third, the party against whom collateral estoppel is asserted must have been a party, or in privity with a party, to the prior adjudication. Bernhard v. Bank of America, 19 Cal. 2d 807, 813, 122 P. 2d 892, 895 (1942) (citations omitted); Miller v. Superior Court, 168 Cal. App. 3d 376, 381, 214 Cal. Rptr. 125, 128 (1985).

Motions to suppress evidence under California Penal Code section 1538.5 are not considered final judgments under California law for purposes of collateral estoppel. People v. Gephart, 93 Cal. App. 3d 989, 156 Cal. Rptr. 489 (1979). In Gephart, defendants were convicted of armed robbery in Siskiyou County, California, after the superior court in that county refused to suppress evidence which had been ordered suppressed as a result of a section 1538.5 suppression motion made in a

prior prosecution of the defendants on different charges in the superior court in Stanislaus County, California. The charges in Stanislaus County were dismissed after the suppression motion was granted. The defendants argued that under principles of res judicata and collateral estoppel, the superior court in Siskiyou County was bound by the ruling suppressing evidence which had been made in Stanislaus County. The California Court of Appeal rejected this argument, holding that neither res judicata nor collateral estoppel were applicable because the prior ruling on the suppression motion in Stanislaus County made under California Penal Code section 1538.5 could not be considered a final judgment for purposes of either res judicata or collateral estoppel. "The determination on a motion under Penal Code section 1538.5 is a preliminary evidentiary determination and is independent of

the real question in the proceedings, that of the accused's guilt." Gephart, 93 Cal. App. 3d at 1000, 156 Cal. Rptr. at 495 (citation omitted). Compare Miller vs. Superior Court, 168 Cal. App. 3d 376, 214 Cal. Rptr. 125 (1985) (city collaterally estoppel in civil action from relitigating issue of whether plaintiff was raped by city police officer where officer had been convicted of raping plaintiff in prior criminal case; prior conviction was a final judgment).

Because an order suppressing evidence under California Penal Code section 1538.5 is not a final judgment on the merits, Heath has failed to satisfy the first requirement for the application of the doctrine of collateral estoppel. We need not, therefore, reach the questions of issue identity or privity. The district court properly refused to apply the doctrine of collateral estoppel.

C. Prior Bad Acts

Heath contends the district court erred in admitting evidence of his prior arrest by Newport Beach police officers and evidence of his brother's prior misdemeanor convictions resulting from arrests made by the same police agency. He argues the court improperly admitted this evidence to prove his character in violation of Federal Rule of Evidence 404 (b).[2] He further contends that even if the evidence was relevant to show bias against the Newport Beach police officers, the prejudicial

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2. Rule 404(b) provides:
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

effect of the evidence outweighed its probative value and the evidence should have been excluded under Rule 403 of the Federal Rules of Evidence.[3]

We first consider whether the trial court abused its discretion in determining that this evidence of prior bad acts was relevant to the issue of bias of Heath and his brother against the Newport Beach police, and admissible under Rule 404(b). At trial, Heath agreed to stipulate that he and his brother were biased against the police officers. He argues it was error for the court to admit the evidence for the purpose of showing bias when he was willing to stipulate to the very bias the evidence was offered to show.

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3. Rule 403 provides in part:
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...

"Rule 404(b) is 'one of inclusion which admits evidence of other crimes or acts relevant to an issue in the trial, except where it tends to prove only criminal disposition.'" United States v. Sangrey, 586 F. 2d 1312, 1314 (9th Cir. 1978) (quoting United States v. Rocha, 553 F. 2d 615, 616 (9th Cir. 1977)) (emphasis in original). Evidence of Heath's prior arrest, and of his brother's prior misdemeanor convictions, were probative of their bias against the Newport Beach police and of Heath's motive in bringing this action. The jurors, as sole triers of fact and credibility, were entitled to hear the evidence and decide the extent of that bias. A stipulation simply that bias exists precludes the jury from assessing the degree of bias. The trial court did not abuse its discretion in admitting this evidence notwithstanding Heath's proposed stipulation.

We next consider whether the trial court erred in determing under Federal Rule of Evidence 403 that the probative value of the evidence of prior bad acts was not substantially outweighed by the danger of prejudice from the admission of that evidence. It appears from the trial record that the probative value and prejudicial effect of the evidence were adequately weighed by the court before the evidence was admitted. The court also gave the jury a limiting instruction with respect to this evidence.[4]

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4. Heath was asked on cross-examination: "Directing your attention now to the date of February 16, 1983 [the prior arrest], on that occasion did a Newport Beach police officer arrest you for being intoxicated in public?" Before Heath could answer, the court interrupted the cross-examination and instructed the jury:

> Any evidence of a February 26, 1983 contact between plaintiff and officers of the Newport Beach Police Department is received and may be considered only for a limited

Evidentiary rulings are reviewed for abuse of discretion. Coursen v. A. H. Robins, 764 F.2d 1329, 1333 (9th Cir. 1985). The district court did not abuse its discretion in admitting the evidence of prior bad acts.

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4. (cont'd.)

> purpose, to show, to the extent it does tend to show, any bias or prejudice of the plaintiff toward the Newport Beach Police Department.
>
> In short, it is received only insofar as it may tend to reflect on the credibility of plaintiff's testimony and not for any other purpose.
>
> Specifically, it may not be used to show that the plaintiff acted in any particular way on the date of the incident in question.
>
> And, further, you should understand that any such evidence is not used to show any character trait of the plaintiff or that he was or was not guilty in fact of the offense for which he was arrested, if he was arrested on another occasion.
>
> Again, the purposes of the evidence is limited to your consideration of the question of bias, if any, of the plaintiff against the Newport Beach Police Department insofar as it tends to show such.

D. Evidence of Dismissal of Criminal Charges

Heath contends the district court erred in failing to admit evidence of the state court's dismissal of the criminal charges against him. He argues it was unfair and asymmetrical to admit evidence of his prior arrest, but reject evidence that the criminal charges relating to his more recent arrest which was the subject of the present lawsuit had been dismissed. The trial court considered this argument, weighed the relevant factors, and determined that evidence of dismissal of the criminal charges would be more prejudicial than probative. The criminal charges had been dismissed on Heath's motion, unopposed by the prosecution, following the state court's ruling suppressing testimony by the arresting officers. The dismissal did not establish Heath's innocence nor was it probative of whether the officers acted with probable cause or used

excessive force in effecting Heath's arrest. The district court did not abuse its discretion in rejecting this evidence. Fed. R. Evid. 403.

E. Jury Instructions

Heath argues the court erred in refusing to give the following instruction to the jury:

> If you should find that a party willfully suppressed evidence in order to prevent its being presented in this trial, you may consider such suppression in determining what inferences to draw from the evidence or facts in the case against him.[5]

He contends the defendants intentionally suppressed initial reports of the defendants' two expert medical witnesses, Doctors Sharma and Petersons, and that the identity of two other witnesses was concealed from him.

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5. This instruction is taken from California's standard BAJI Instruction 2.03. There is no comparable standard instruction for use in civil cases in federal court. See E. Devitt & C.

The record reveals that Heath must have known of the existence of Dr. Sharma's initial report during pretrial discovery because it was referred to in a subsequent report by Dr. Sharma which had been provided to Heath. As to Dr. Petersons' initial report, that was furnished to Heath sufficiently in advance of Dr. Petersons' examination to permit effective cross-examination. Finally, the names of the witnesses Heath claims were concealed were disclosed during trial and the district court recessed the trial to permit Heath to depose them. He did so, and then did not call either of them as a witness. No evidence was suppressed and the court did not err in refusing to give Heath's requested willful

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5. (cont'd.)
Blackmar, Federal Jury Practice and Instructions, § 72.19 (3d ed. 1977 7 Supp. 1986). In California it is prejudicial error to give BAJI 2.03 if there is no showing that evidence has been at least willfully, and perhaps fraudulently,

suppression of evidence instruction. See United States v. Wellington, 754 F. 2d 1457, 1463 (9th Cir.), cert. denied, ___ U.S. ___, 106 S. Ct. 593, 88 L. Ed. 2d 573 (1985) (trial court has broad discretion in formulating jury instructions and will be reversed only upon a showing of abuse of discretion); compare 999 v. CIT Corp., 776 F. 2d 866, 871 (9th Cir. 1985) (the claim that a court failed to give the jury a proper jury instruction is a question of law reviewable de novo). Under either standard, the district court did not err in refusing to give the requested instruction.

Heath also contends the district court committed error in failing to give instructions

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5. (cont'd.)
suppressed. See County of Cotra Costa v. Nulty, 237 Cal. App. 2d 593, 47 Cal. Rptr. 109 (1965).

which he requested pertaining to probable cause, use of excessive force, and defining an "arrest". These claims are without merit. A court is not required to instruct the jury in words chosen by a party nor to incorporate every proposition of law a party suggests. It is sufficient if the instructions as given allow the jury to determine intelligently the issues presented. Los Angeles Memorial Coliseum Commission v. National Football League, 726 F. 2d 1381, 1398 (9th Cir.), cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984). Considering the instructions as a whole, the jury was adequately instructed on each element of the case and the instructions given by the trial judge accurately reflect controlling law. Id.

Heath's contention that the district court erred in giving an instruction on the officers' good faith is also without merit. The just of this argument is that the officers' good faith

is relevant only in connection with a defense of qualified immunity and Heath contends that defense is not available in this case. He's wrong in this connection. We have recently held that "[t]he qualified immunity defense is available in cases of unlawful arrest." Hamblen v. County of Los Angeles, 803 F. 2d 462, 465 (9th Cir. 1986) (citations omitted). And in any event only one jury instruction included the words "good faith," and that instruction concerned the issue of punitive damages, not qualified immunity.[6]

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6. That instruction reads:

> The defendants contend that on or about the date and at the time and place alleged, certain defendants did arrest the plaintiff with probable cause to do so and used reasonable force to effect his arrest. But defendants deny that any conduct or act of theirs deprived the plaintiff of any right or privilege or immunity secured to him by the Constitution or laws of the United States and further deny that plaintiff was injured as a result of any unlawful act or conduct by the defendants or that plaintiff was injured or damaged in the

F. The Medical Expert Witnesses

The defense had two medical expert witnesses: Dr. Sharma, a psychiatrist, and Dr. Petersons, a neurosurgeon. Both of these doctors examined Heath on two separate occasions. Each prepared an initial report and a subsequent report. During the discovery phase of the case, the magistrate ordered all defense medical reports turned over to Heath. The defense turned over the second reports, but did not turn over the initial reports. These initial reports were furnished to Heath's counsel at the time of trial.

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6. (cont'd.)
amount or sum claimed by him or any other sum or amount. And they also deny that any act or conduct of the defendants toward plaintiff was malicious or wanton or oppressively done. And in this connection defendants allege that all of their acts and conduct of which the plaintiff complaints were done in good faith in the pursuant of the defendants' lawful authority and lawful duty as a police officer. (emphasis added).

1. Court's Refusal to Recall Dr. Sharma

Dr. Sharma testified and was excused. Thereafter, Heath's counsel claimed he learned of the existence of Dr. Sharma's initial medical report only after Sharma had completed his testimony. He requested permission to recall Dr. Sharma so that Sharma could be cross-examined on his initial report. The district court refused to permit Heath to recall Sharma. The court found that Heath's counsel must have been aware of the existence of Sharma's initial report during the discovery phase of the litigation and rejected Heath's claim of surprise. Heath's counsel was then permitted to read into the record, before the jury, a paragraph from Dr. Sharma's report which Heath contended impeached Sharma.

The defense may have disobeyed a discovery order in failing to run over Sharma's initial report earlier, but the district court

did not abuse its discretion in refusing to permit Heath to recall Sharma. Since Heath had adequate notice of the existence of the initial Sharma report during the discovery phase of the litigation, he could have moved to compel into production and neglected to do so. See Peraza v. Delameter, 722 F. 2d 1455, 1456 (9th Cir. 1984).

2. Court's Refusal to Exclude Dr. Petersons' Testimony

Heath's counsel was provided with a copy of Dr. Petersons' initial report before Peterson testified. Heath contends, however, that because the defense failed to turn over this report until the time of trial he was "deprived of an opportunity to evaluate the report and to effectively question Petersons because [he] had no opportunity to read, digest, and evaluate that report, and then to consult with appropriate experts to formulate

questions for Petersons." The record reflects, however, that Dr. Petersons was present and ready to testify at the trial on Friday, November 8, 1985. When Heath's counsel became aware of the existence of Dr. Petersons' initial report, he moved to exclude Petersons' testimony based upon his claims that failure to provide the report violated the magistrate's discovery order in the cases. The district court refused to exclude Dr. Petersons' testimony because to have done so would have been to severe a sanction, even if the discovery order had been violated. The district court then continued the trial to the following Tuesday, November 12th, so that Heath's counsel could review Petersons' initial report and consult with his own expert. Heath's medical expert was scheduled to testify at 9:00 a.m. on November 12th. Dr. Petersons'

testimony was rescheduled to 1:30 p.m. on November 12th. Heath's argument that he was denied the opportunity to review Dr. Petersons' initial report and consult with his own medical expert in advance of examining Petersons is without merit. That simply did not occur. The trial court did not abuse its discretion in refusing to exclude Dr. Petersons' testimony. AFFIRMED.

# APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| WILLIE MC KINLEY<br><br>Plaintiff/Appellant,<br><br>vs.<br><br>CITY OF RIVERSIDE,<br>RICHARD M. CANALE,<br>THOMAS R. BUCKINGHAM,<br>KEITH V. MC CAULEY,<br>RALPH MOORHOUSE, and<br>WILLIAM EDENHOFER,<br><br>Defendants/Appellees. | CV-81-6208-AAH<br><br>MEMORANDUM* <br><br>FILED JUNE 3, 1987 |

Appeal from the United States District Court for the Central District of California.
Andrew A. Hauk, District Judge, Presiding

Submitted May 13, 1987**

BEFORE: ANDERSON, PREGERSON, and NOONAN, Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The panel agrees that this case is appropriate for submission without oral argument. Fed. R. App. P. 34(a) and Ninth Cir. Rule 3(f).

Appellant McKinely presses three claims on appeal from an adverse jury verdict in his civil rights action under 42 U.S.C. § 1983: (1) that the defendants did not have available to them the defense of qualified immunity, (2) that they inadequately raised the defense in their responsive pleadings, (3) that the judge failed to adequately instruct the jury by introducing the subjective element of good faith into the defense. We reject all three contentions.

First, McKinley claims that where the law is clearly established, the defense of qualified immunity should fail as a matter of law, citing Harlow v. Fitzgerald, 457 U.S. 800 (1982).

McKinley points out that the law on unlawful seizures and illegal arrests was already well-established when the officers acted. This Court has held, however, that the

defense is available when the defendants "acted under a reasonable belief that [they were] doing right" even though applicable constitutional standards were "sufficiently well-established." Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, at 1466-1467 (9th Cir. 1984). Second, the pleadings adequately, though inartfully raised the defense. Finally, Harlow itself demands both an actual lack of knowledge of unconstitutional conduct and an objectively reasonable belief that the actions taken were not unconstitutional. Harlow, at 819. Both subjective and objective elements are injected into the elements of the qualified immunity defense. The trial judge properly instructed the jury that the defendants must have "reasonably believed" that he was acting in conformity with the law and that they acted "in good faith on this belief."

AFFIRMED.